



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240



OCT 14 2010

CERTIFIED MAIL
RETURN RECEIPT

Craig S. Denney
Downey Brand, L.L.P.

Reno, Nevada 89509

Re: Proposed Debarment of David Overvold, DOI Case No. 09-0001-01.

Dear Mr. Denney:

This is to provide you with my written determination as the U.S. Department of the Interior (DOI) Debarment Official, regarding the proposed debarment of David Overvold (Overvold). Based upon the information presented, on balance, imposition of a further period of debarment beyond his award ineligibility period to date is unnecessary to protect Federal procurement and nonprocurement program award activities.

I. Brief Procedural History.

By Notice dated July 2, 2009, DOI initially suspended Overvold under the Federal Acquisition Regulation (FAR) debarment rules at 48 C.F.R. Subpart 9.4. DOI based the suspension upon the fact of Overvold's indictment, along with the Truckee Carson Irrigation District (TCID) and three other individuals, by the United States District Court for the District of Nevada. The indictment charged the defendants with conspiracy to defraud the United States in violation of 18 U.S.C. § 371; falsification of records in violation of 18 U.S.C. § 1519; false claims in violation of 18 U.S.C. § 287; false statements in violation of 18 U.S.C. § 1001; and aiding and abetting in violation of 18 U.S.C. § 2.

On October 30, 2009, Overvold entered into a pre-trial diversion agreement to resolve the criminal action against him. The United States District Court for the District of Nevada approved and entered the Agreement on January 11, 2010.

Following resolution of the criminal proceedings, DOI proposed to debar Overvold by Notice dated May 11, 2010. The Notice proposed debarment from Federal procurement and non-procurement program activities for a three (3) year period. The Notice relied upon information provided in an Action Referral Memorandum (ARM) from the DOI Office of Inspector General (OIG) regarding the prosecution and the fact of the pre-trial diversion agreement.

Overvold, through counsel, timely contested the Notice of Proposed Debarment by letter dated June 9, 2010. The letter provided written information in opposition to the notice and requested the opportunity to also make an oral presentation of matters in opposition (PMIO). By email dated June 23, 2010, David Sims, DOI Debarment Program Manager, established a schedule for proceeding on the matter. In response, by email dated July 30, 2010, Respondent forwarded a copy of a power point slide presentation made to the US Attorney's Office on March 24, 2010, subsequent to the entrance of the pre-trial diversion agreement.

A PMIO was scheduled and held on August 30, 2010. You and Overvold participated by telephone conference connection. Participating with me on behalf of DOI were Mr. Sims and the case representative, Stanley Stocker, of the OIG Acquisition Integrity Unit.

Following the PMIO, Overvold, by email dated August 30, 2010, provided additional information requested during the PMIO regarding the termination date for his pre-trial diversion agreement. As scheduled at the PMIO, the case representative provided written observations on Overvold's written submissions and PMIO information, by memorandum dated September 17, 2010. With that submission, the record closed.

Upon review of the record, the information does not raise a genuine dispute over facts material to the existence of cause for debarment that would necessitate additional fact-finding proceedings. The matter is ready for final decision.

II. Discussion.

Debarment is an administrative action taken to shield the government from individuals and entities who, because of waste, fraud, abuse, noncompliance or poor performance, threaten the integrity of federally funded procurement and non-procurement activities. Debarment is not employed as punishment for misdeeds. That is the purview of other forums. Rather, debarment addresses present responsibility with regard to participation in federally funded work.

A. Cause for Debarment.

The existence of cause for debarment is the requisite starting point for evaluation. On December 3, 2008, Overvold, along with TCID and other individuals, was indicted in the United States District Court for the District of Nevada on charges of conspiracy to defraud the United States in violation of 18 U.S.C. § 371; falsification of records in violation of 18 U.S.C. § 1519; false claims in violation of 18 U.S.C. § 287; false statements in violation of 18 U.S.C. § 1001; and aiding and abetting in violation of 18 U.S.C. § 2.

The charges against Overvold pertained to his actions while project manager for the Truckee Carson Irrigation District (TCID) in connection with a scheme to fraudulently obtain from the DOI Bureau of Reclamation for the TCID incentive credits with their attendant value, in the form of thousands of acre-feet of water based upon falsified numbers for water delivered and maintained over at least six irrigation seasons.

Overvold entered into his pre-trial diversion agreement to resolve the criminal action against him on October 30, 2009. The Court approved the Agreement and entered its case disposition Order at a hearing on January 11, 2010. The Agreement deferred further prosecution of Overvold for a period of eighteen months. Upon fulfillment of the terms and conditions of the Agreement the Court will dismiss with prejudice the Indictment against Overvold.

The Agreement required Overvold to resign from, or otherwise terminate and not seek or accept reemployment in any capacity with, TCID within ten days of the Court's approval of the Agreement. The Agreement required Overvold to report to a pre-trial diversion supervisor. The Agreement states that Overvold waives any and all demands, claims, or causes of action arising from the investigation and prosecution of the charges set forth in the Indictment and bears his own costs, attorney fees and expenses in connection with the litigation. In the Agreement, Overvold acknowledges that "the Government's investigation has adduced evidence sufficient to proceed to trial on the Indictment" and that he is not a "prevailing party" within the meaning of the Equal Access to Justice Act. The Agreement also states that in the event of violation of its terms the Government may reinstate the prosecution and proceed to trial. Simultaneous with the acceptance of the pretrial diversion agreement for Overvold, the Court dismissed the Indictment against TCID and the remaining individual defendants.

Overvold raises several contentions in opposition to the proposed debarment under 48 C.F.R. Subpart 9.4. Overvold argues that the FAR debarment rules should not apply because the charged misconduct did not arise out of a contract governed by the FAR. Conjunctively, Overvold contends the debarment rule at 48 C.F.R. 9.4 applies only to contractors and that Overvold was never a government contractor.

Debarment is a remedy for the Government as a consumer of goods and services which focuses on business risk. Debarment is prospective, applying to preclude eligibility for future awards. It is incumbent on the debarring official when presented with information indicating the presence of past conduct indicating a lack of business integrity, honesty or poor performance to evaluate the necessity for protection of Federal procurement and nonprocurement award program activities.

It is well established that when presented with information indicating a lack of business honesty or integrity the Government need not wait until it is actually harmed in the course of performance of a Federal contract or assistance award before acting to exclude a person from future award eligibility. It is readily apparent in this case that the charged misconduct recited in the Indictment involved a Government funded program. The debarment rules are essentially procedural rules with reciprocal effect of action. At the discretion of the debarring official, action may be taken under either the FAR debarment rule or the nonprocurement rule.

Under the definition of "contractor" at 48 C.F.R. § 9.403, a person falls within the definition either where business is directly conducted under a Government contract or subcontract, or where the person "may reasonably be expected" to conduct such business. Considering

Overvold's years of experience as a manager in the field of federally funded public water resource programs it is reasonable to anticipate that he may seek to participate in federally funded work, directly or indirectly, or as an agent or representative of another contractor or assistance recipient.

Overvold asserts that the debarment process applies only to corporations and other business entities and not to individual employees. Overvold asserts that the debarment process is not intended to affect employees, only the contractor organization claiming that "nowhere in [Section 9.406] is an individual employee mentioned." This assertion is not well founded. Debarment unquestionably applies to both business entities and individuals, both directly, through imputation of conduct from individuals to organizations and vice versa, and through the connective mechanism of affiliation, i.e., control. Broadly stated, under the debarment rules, debarred individuals are ineligible to directly receive awards or to act as principals, agents, representatives or key employees of organizations performing federally funded awards. See the effect of listing provisions at 48 C.F.R. § 9.405 and scope of debarment provisions at 48 C.F.R. § 9.406-5(a), as well as the affiliates definition at § 9.403.

Overvold contends that the Debarring Official erred in not analyzing the factors at § 9.406-1 prior to notice issuance. Overvold misperceives the process. As stated at § 9.406-1 the factors pertain to the information which the Debarring Official should consider "in making a debarment decision." The Debarring Official's determination to debar is made on the completed administrative record. It follows notice issuance and, where an action is contested, receipt of information from the respondent regarding mitigating factors or remedial measures taken by the respondent to address and preclude recurrence of the conduct giving rise to cause for action.

Finally, Overvold argues that his deferred prosecution agreement should not constitute cause for debarment because it contains no admission of guilt or adjudication of any crime, or requirement for restitution or performance of community service. The January 11, 2010, Federal District Court Order resolved the criminal proceeding against Overvold under the pre-trial diversion process, a mechanism courts are increasingly utilizing for docket management purposes. Overvold elected to accept the resolution by pretrial diversion rather than litigate the charges. Overvold was charged by Indictment with serious felony offenses including conspiracy to defraud the United States, false claims, falsification of records, and false statements. The Court's disposition is not an acquittal or finding of not guilty. The Court evidently concluded there was sufficient justification to support treating Overvold differently than TCID or the other individual defendants, for whom the criminal indictment was dismissed outright.

While the Agreement does not require payment of restitution or performance of community service, it does impose an economic sanction upon Overvold. He must immediately resign from, or otherwise end his employment with TCID, and not seek or accept future employment at TCID in any capacity. The Agreement also imposes other terms and conditions including reporting

to the pre-trial diversion agreement equivalent of a probation officer, acknowledgment that Overvold is not a prevailing party in the criminal proceeding, and the surrender of any claims he might attempt to assert against the government arising out of the prosecution.

The debarment remedy focuses on responsibility rather than liability and punishment. For present responsibility purposes, a pre-trial diversion or other deferred prosecution agreement participated in by the court is interpreted as the functional equivalent of a conviction sufficient to provide the basis on which an initial suspension or a debarment action can proceed to a final resolution as to the need for debarment. Inclusion of an admission of guilt in a pre-trial diversion or other deferred prosecution vehicle participated in by the Court is not required for the agreement to fall within the definition of conviction for debarment purposes. That predicate condition only applies to agreements entered into between the prosecutor and the defendant without the participation of the Court. This is made express under the nonprocurement rule for the definition of conviction stated at 2 C.F.R. 180.920.

Section 180.920 defines "conviction" as: "(a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or (b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt."

The rationale for the definition is illustrative. It is set forth at 68 FR 66,534, 66541 (November 26, 2003). The Preamble states:

"The rule expands the definition of conviction to focus on the practical reality of the criminal proceeding's conclusion rather than the technical requirement that a judgment be "entered". 68 FR 66541 (November 26, 2003). The use by the courts of alternative disposition mechanisms to manage case loads may have social benefits for the administration of the criminal justice system, but does not create a bar to the Government to take the action into account in making commercial business decisions. To conclude otherwise would yield the anomalous result that where the judicial branch of government imposes the functional equivalent of a sentence for charged criminal misconduct by an individual or business entity, the Executive Branch would be unable to take cognizance of that action in making a decision on business risk posed by the individual or business."

The FAR debarment rule at Subpart 9.4 does not include a definition of "conviction." A definition of conviction appears in the general FAR definition section at 48 C.F.R. Part 2. The FAR definition for conviction is identical to the subsection (a) portion of the conviction definition at 2 C.F.R. § 180.920, but does not include a reference to pre-trial or otherwise deferred prosecution agreements.

For FAR purposes, in the absence of an express clause in the Part 2 conviction definition, based upon the same rationale behind the nonprocurement definition, debarring officials interpret the existence of a pre-trial diversion agreement as a fact of record that establishes the existence of cause for debarment under the FAR at § 9.406-2(c): "...any other cause of so serious or compelling nature that it affects the present responsibility of a contractor or subcontractor" rather than under § 9.406-2(a).

The DOI Notice of Proposed Debarment issued to Overvold on May 11, 2010, cites § 9.406-2(c) for debarment cause. However, DOI, by interim final rule effective May 17, 2010 (75 FR 19838, April 15, 2010), and final rule effective August 12, 2010, (75 FR 48873, August 12, 2010) has in its Department of the Interior Acquisition Regulation (DIAR), at 48 C.F.R. § 1409.403, which supplements FAR Subpart 9.4, expressly incorporated into the definition of "conviction" for debarment purposes, the subsection (b) wording of the nonprocurement definition of "conviction".

The ARM's information presents a clear and rational basis for concern regarding conduct by Overvold indicating a lack of business honesty and integrity. Overvold's pre-trial diversion agreement is a fact of record. The Agreement approved and entered by the District of Nevada establishes the existence of cause for debarment under FAR § 9.406-2 (c) and, effective May 17, 2010, also under § 9.406-2 (a), via DIAR § 1409.403.

B. Mitigation Factors and Remedial Measures.

Debarment, both by its remedy nature and as a matter of regulation, is not an automatic result of establishing the existence of cause for debarment. Debarment is first and foremost about the present rather than the past. It well established that it is a remedy for use to protect government procurement and nonprocurement program interests only where truly warranted. It is not punishment. The seriousness of the past misconduct and any information presented by a contractor that persuasively indicates mitigating factors, altered circumstances, remedial measures, or other actions taken that address present responsibility is evaluated in reaching a decision on debarment.

The focus here is on the business honesty and integrity of Overvold as an individual. The information provided for the record by AIU and Overvold, is considered in reaching a decision on debarment. The information received careful review and evaluation against relevant criteria at 48 C.F.R § 9.406-1(a).

The charged offenses underlying this action are serious in nature and felonies. However, the sanction ultimately imposed by the District Court indicates a relatively low level of individual culpability. The pre-trial diversion agreement required Overvold to immediately resign from TCID and not seek reemployment with the organization. No restitution, fine, or community service is imposed. The period of the agreement is limited to 18 months at which time the Indictment will be dismissed with prejudice.

Overvold is in the process of fulfilling the terms and conditions of his pretrial diversion agreement. He has severed his employment with TCID and is complying with all other terms of the Agreement.

Overvold stated both in his written submission and at the PMIO that on June 8, 2010, the U.S. Pre-trial Services Officer in Nevada advised of the intent to ask the U.S. Attorney's Office (USAO) to terminate the diversion after just six months due to Overvold's full compliance with its terms. Overvold observes that this is extremely significant since the original term of diversion was 18 months.

At the PMIO Overvold was requested to provide documentation on the recommendation. By email dated August 30, 2010, counsel for Overvold forwarding a copy of an email from the U.S. Pretrial Services Officer advising that the USAO had declined the recommendation for early termination request. However, the Officer further noted that the request would be renewed. For the purpose of the debarment process the assessment of Pretrial Services Officer, as the official most directly responsible for monitoring the compliance with the Agreement reflecting on Overvold's compliance attitude, is given weight in reaching a decision on whether to impose debarment.

The actions of voluntary self-disclosure of misconduct and, or, the degree of cooperation with an investigation and legal proceedings can speak to a contractor or individual's present conformance to ethical standards of business conduct. The factual information as to the underlying criminal prosecution is limited as the matter resolved without proceeding to trial.¹

There is no indication that Overvold made a self disclosure that then led to the Government's investigating TCID. However, based upon the information presented by Overvold at the PMIO, it appears that he was instrumental in initiating and conducting an internal investigation at TCID once aware of the allegations regarding water usage write offs misconduct by certain TCID employees designated as "ditch riders." Overvold stated at the PMIO that after initiation of the Government's investigation he was instrumental in TCID performing its own internal investigation, and bringing the resulting information to the attention of the Government, taking corrective action. Overvold also stated that based upon his investigation he recommended TCID take disciplinary action against an employee involved. Overvold states in his June 9, 2010 written submission: "TCID has in place revised review and control measures to correct the issues and has trained its personnel to avoid this in the future. All of these actions were undertaken while Mr. Overvold was still the Project Manager."

¹ Overvold through counsel contends that the criminal case collapsed due to questionable conduct of authorities involved in the prosecution and misinterpretation of TCID water usage reporting data. This is a speculative, or otherwise one sided representation made in the absence of the prosecutor. It is outside the purview of this administrative proceeding.

Based on the information presented at the PMIO it appears that while the remedial actions were on behalf of TCID as an organization, Overvold as Project Manager took the initiative to direct an internal investigation at TCID into the allegations and to implement water usage reporting measures designed to preclude future occurrence of the type of data reporting misconduct alleged in the Indictment. Overvold's answers to questions posed at the PMIO appeared to be forthright and unequivocal. Based upon the information presented including Overvold's direct personal statements it appears he presently understands the need for and importance of proper data reporting and operation under ethical business standards.

The record contains no indication of any previous civil or criminal prosecutions of Overvold. Similarly, there is no information showing previous exclusions or disqualifications from Federal non-procurement or procurement programs, or any administrative agreements with conduct similar to that underlying this debarment action. On the record presented, it appears that events underlying the prosecution constitute an isolated episode in a professional career spanning many years.

III. Conclusion.

The Notice proposed a three (3) year debarment, the general time period provided under the rules. The record establishes the presence of cause for debarment. However, as discussed above, the record also contains mitigating information. In conjunction with that information is the fact that Overvold has been suspended since July 9, 2009. Under 48 C.F.R. §§ 9.405(a) and 9.406-4(a) (2), the period of any debarment imposed measures from the date of initial award ineligibility. Commencing with the July 9, 2009 suspension notice, Overvold has to date been ineligible for awards for a fourteen month period. That substantial period of award ineligibility carrying as it does an inherent ameliorative effect serves the remedial purposes of debarment. Balancing the information available and presented for the record, I conclude that a further period of award ineligibility is unnecessary to protect Government procurement and nonprocurement program activities. Accordingly, effective the date of this determination, the debarment action against David Overvold is terminated and the EPLS shall promptly be modified to show the termination of award ineligibility.

Sincerely,



Debra E. Sonderman, Director
Office of Acquisition and Property Management

cc: David M. Sims, PAM
Jim Weiner, SOL
James Smith, OIG/AIU
Stanley Stocker, OIG/AIU
Official Case File